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In The

Supreme Court of the United States

October Term, 1983

No. 83-1780

AARON MARK ZIMMERMAN,

Plaintiff-Petitioner,

vs.

GRIEVANCE COMMITTEE OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEW YORK; MICHAEL F. DILLON, JOHN J. CALLAHAN, JAMES H. DOERR, M. DELORES DENMAN, EMMETT J. SCHNEPP, STEWART F. HANCOCK, JR., RICHARD D. SIMONS, And REID S. MOULE, All Individually And Jointly In Their Capacities as Justices Of The Appellate Division Of The Supreme Court Of The State Of New York, Fourth Judicial Department; THE ONONDAGA COUNTY BAR ASSOCIATION; And THE NEW YORK STATE BAR ASSOCIATION,

Defendants-Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT NEW YORK STATE BAR ASSOCIATION IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Was the District Court's dismissal of the case properly affirmed by the Court of Appeals for the Second Circuit?

STATEMENT OF THE CASE

The instant proceeding is a petition for writ of certiorari to the United States Court of Appeals for the Second Circuit to review the decision and order of that court, dated January 27, 1984, affirming the judgment, dated June 8, 1983, of the District Court for the Northern District of New York dismissing the action brought by Petitioner Zimmerman.

Zimmerman, an attorney admitted in 1977 to practice law in New York State, in 1979 listed himself in the Yellow Pages of the Syracuse area New York telephone directory under each of twenty-five available categories of legal practice. Such listing appeared under the caption, "Lawyers Grouped by Practice."

As a result of this advertising, disciplinary proceedings were instituted against Zimmerman by the Grievance Committee of the Fifth Judicial District before the Supreme Court of the State of New York, Appellate Division, Fourth Department, for violation of the appropriate rule governing attorney advertising as set forth in 22 N.Y.C.R.R. 1022.16(a) and DR 2-101(A) of the Lawyer's Code of Professional Responsibility. The Appellate Division thereafter issued a decision and order censuring Zimmerman for professional misconduct. The decision was formally reported at 79 A.D. 2d 263 (1981). An appeal to the New York Court of Appeals was then dismissed, 53 N.Y. 2d 937 (*mem.* 1981), with a further motion for leave to appeal denied, 54 N.Y. 2d 606 (*mem.* 1981).

Zimmerman then instituted an action in United States District Court for the Northern District of New York pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1331 seeking declaratory and injunctive relief from the decision and order of the Appellate Division, Fourth Department. Joined as defendants were the Grievance Committee of the Fifth Judicial District, the Onondaga County Bar Association and the New York State Bar Association. Motions to dismiss were filed by counsel for all defendants and were granted pursuant to Fed. R. Civ. P. 12(b)(1) by the District Court. The decision and order of the District Court, dated June 8, 1983, are set forth at pages A7-A13 of the appendix to Zimmerman's petition.

Zimmerman subsequently appealed said decision and order of

the District Court to the United States Court of Appeals for the Second Circuit. By decision of January 27, 1984, the Court of Appeals affirmed the lower court ruling (appendix to petition pp. A1-A6), giving rise to the instant petition by Zimmerman for a writ of certiorari.

SUMMARY OF ARGUMENT

The District Court properly dismissed Zimmerman's action for want of subject matter jurisdiction, in accordance with the decision in *District of Columbia Court of Appeals v. Feldman*, —U.S.—, 103 S. Ct. 1303 (1983). The District Court fairly determined that Zimmerman's complaint centered upon a particular lawyer's discipline for violation of the applicable rules governing attorney advertising rather than a generalized attack on the constitutionality of the rules. This dismissal was properly affirmed by the United States Court of Appeals for the Second Circuit. It is respectfully submitted, therefore, that no basis exists for the granting of certiorari pursuant to 28 U.S.C. §1254 and the considerations set forth in Rule 17 of this Court.

ARGUMENT

While Zimmerman has set forth three questions at page 2 of his petition, it is submitted these can be reduced to a single issue: Was the matter correctly decided by the District Court and affirmed by the Court of Appeals? It is respectfully submitted that this question may be answered in the affirmative.

As noted in the decision of the Court of Appeals (at A5 of Zimmerman's appendix to the petition), at the appellate level Zimmerman has endeavored to broaden his challenge to include a general attack upon the constitutionality of the rule governing lawyer advertising in New York. However, as indicated by the Court of Appeals, this case is actually concerned with a challenge to a state court decision in a particular case, rather than a general challenge to the New York rule governing lawyer advertising as contained in 22 N.Y.C.R.R. 1022.16(a) and DR 2-101(A) of the Code of Professional Responsibility.

Zimmerman in essence is contending that the Appellate Divi-

sion, Fourth Department, in disciplining him promulgated a new rule that participation by lawyers in grouped-by-practice Yellow Pages listings constitutes a *per se* violation of the advertising rules cited in the preceding paragraph. It is submitted, however, that such a reading goes far beyond the ambit of the Appellate Division's decision. While the Appellate Division did point out the potential problems such advertising might pose from the standpoint of public perception of a lawyer's competence, it stopped far short of establishing a *per se* ban on such advertisements. In fact, the Appellate Division specifically recognized the right of attorneys to identify areas of practice in advertisements. *Matter of Zimmerman*, 79 A.D. 2d 263, 265 (4th Dept. 1981). However, the Appellate Division then went on, citing Zimmerman's admitted lack of experience in several of the advertised categories, to state: "If the purpose of the advertisement is to permit a consumer to reach an informed and reliable decision and identify the legal provider for the legal services he desires, which is a legitimate aim, this expectation may not be attained by retaining respondent, who candidly admits to his lack of experience in many of the identified areas of law in which his name is listed." 79 A.D. 2d at 265. The opinion further stated:

> "Measuring the conduct of respondent against the plain and obvious meaning and intent of the regulation, we conclude that the potential for deception was created by the advertisement and respondent's listings were deceptive and misleading . . . . We hold here that commercial speech must be honest and truthful, and prospective clients should not be beguiled or deceived by the content or the subject matter of the public utterance. Respondent's conduct subverted the true purpose of permitted advertising by lawyers and no prior sanction should be required to insure complete honesty and truthfulness by lawyers in all of their utterances, public or otherwise." 79 A.D. 2d at 266.

The Appellate Division by this language was clearly limiting its holding to Zimmerman, merely applying the relevant advertising standards to the factual situation presented by his conduct, and did not establish a *per se* ban against grouped-by-practice listings. This latter point was specifically noted by the Court of Appeals

(A6 of Zimmerman's appendix to the petition), which found that the Appellate Division had stopped short of promulgating a prohibition on the grouped-by-practice listings.

The Court of Appeals further rejected Zimmerman's contention that the Appellate Division's interpretation and application of the advertising rule constituted promulgation of a new rule (A5 of Zimmerman's appendix to the petition). It is submitted that this holding by the Court of Appeals was correct, as borne out by the above quotations from the Appellate Division opinion which indicate that the latter court's opinion was directed solely at the facts and circumstances of Zimmerman's situation without promulgating a new advertising rule.

Thus Zimmerman's challenge at the District Court level related to his own particular case, and as such was not subject to District Court review. It is submitted therefore, that the case was properly dismissed under the holding of *District of Columbia Court of Appeals v. Feldman*, —U.S.—, 103 S. Ct. 1303 1983. Moreover, in view of the holding in *Feldman*, it is submitted that there is no outstanding important question of law to come before this Court, nor has the Court of Appeals made a pronouncement in conflict with existing authority. Consequently, it is submitted that no ground has been raised to warrant issuance of a writ of certiorari by this Court.

CONCLUSION

The petition for writ of certiorari filed by Petitioner Zimmerman should be denied in all respects.

Dated: May 11, 1984

Respectfully submitted,

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